No. 94-1963

(3)

Supreme Court, U.S.
FILED
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In The

# Supreme Court of the United States

October Term, 1994

JILL NESLADEK, as Trustee for the Heirs and Next of Kin of Jeremy J. Nesladek, Decedent,

*Petitioner,*

*vs.*

FORD MOTOR COMPANY,

*Respondent.*

*On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit*

## SUPPLEMENTAL BRIEF FOR PETITIONER


WILLIAM H. McDONALD
WOOLSEY, FISHER, WHITEAKER & McDONALD
300 South Jefferson
Suite 600
P.O. Box 1245
Springfield, MO 65801
(417) 869-0581

DAVID F. HERR
MASLON EDELMAN BORMAN & BRAND, a Professional Limited Liability Partnership
3300 Norwest Center
90 South Seventh Street
Minneapolis, MN 55402-4140
(612) 672-8350

ERIC W. KRUGER
*Counsel of Record*
RICKERSON & KRUGER
11422 Miracle Hills Drive
Suite 401
Omaha, NE 68154-4459
(402) 498-8686

*Of Counsel:*

STEPHEN R. McALLISTER
UNIVERSITY OF KANSAS SCHOOL OF LAW
Green Hall
Lawrence, Kansas 66045
(913) 864-4550

*Attorneys for Petitioner*


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## NEW DEVELOPMENT

On August 9, 1995, the Minnesota Supreme Court issued an order vacating its order granting review of the *Lommen* decision of the Minnesota Court of Appeals. (App. K, *infra*).

This new development leaves the opinion which was relied upon by two of the Eighth Circuit judges (*Lommen v. City of East Grand Forks*, 522 N.W. 2d 148 (Minn. Ct. App. 1994)) undisturbed. However, the Minnesota Supreme Court's failure to render an opinion either affirming or reversing *Lommen* leaves Minnesota law unclear. Nesladek's request that the choice of law and forum selection questions be certified to the Minnesota Supreme Court squarely presented the District Court and the Eighth Circuit with the recurring problem posed by the *Erie*/Rules of Decision mandate: "How does a Federal Judge determine *what* is the content of the state law that is to be applied?" Yonover, *A Kinder, Gentler Erie: Reining in the Use of Certification*, 47 Ark. L. Rev. 305, 306 (1994).

> Since *Erie*, only a handful of Supreme Court decisions have shed any light on the problem of ascertaining state substantive law, and those lamps do not contain bright halogen bulbs to read by.

*Id.* at 307.

> While the use of certification procedures "rests in the sound discretion of the federal courts," [*Lehman Bros. v. Schein*, 416 U.S. 386, 392 (1974)] the Supreme Court never has explicitly addressed the propriety *vel non* of denying or granting certification motions. In fact, one of the questions presented in the

> *certiorari* petition of *Salve Regina College*, yet not answered by the Court, was whether the federal court "should . . . certify [an unclear state law question] prior to independently creating a novel rule of state law."

*Id.* at 316.

This Petition squarely confronts the fundamental federalism policy question as to how judicial authority should be distributed between the state and federal judicial systems. Certification plays a major role in the distribution process. As Professor Shapiro noted in the article cited by Ford in opposition to this Petition:

> [Certification] has generally been praised as an effective example of cooperative judicial federalism. [The use of certification] should lessen the burden on federal courts by leaving to the state courts especially difficult issues of state law . . . .

Shapiro, *Federal Diversity Jurisdiction: A Survey and a Proposal*, 91 Harv. L. Rev. 317, 321 (1977).

## CONCLUSION

For the foregoing reasons, as well as the reasons set forth in the Petition for Writ of Cetiorari and the Reply Brief in support of that Petition, Petitioner respectfully requests that the Court grant plenary review of both questions presented.

Respectfully submitted,

WILLIAM H. McDONALD
WOOLSEY, FISHER,
WHITEAKER& McDONALD
300 South Jefferson
Suite 600
P.O. Box 1245
Springfield, MO 65801
(417) 869-0581

DAVID F. HERR
MASLON EDELMAN
BORMAN& BRAND,
a Professional Limited
Liability Partnership
3300 Norwest Center
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ERIC W. KRUGER
*Counsel of Record*
RICKERSON & KRUGER
11422 Miracle Hills Drive
Suite 401
Omaha, NE 68154-4459
(402) 498-8686

*Of Counsel:*
STEPHEN R. McALLISTER
UNIVERSITY OF KANSAS
SCHOOL OF LAW
Green Hall
Lawrence, KS 66045
(913) 864-4550

## APPENDIX K - ORDER OF THE MINNESOTA SUPREME COURT DATED AUGUST 9, 1995

STATE OF MINNESOTA

IN SUPREME COURT

C9-94-671

Sherri Lommen, petitioner,

Appellant,

vs.

The City of East Grand Forks, et al.,

Respondents.

ORDER

It now appearing that the petition for further review of the decision of the Court of Appeals in this matter was improvidently granted by this court,

IT IS HEREBY ORDERED that the December 2, 1994 order of this court granting review of the September 27, 1994 decision of the Court of Appeals be, and the same is, vacated and the appeal is dismissed.

Dated: Aug. 9, 1995

BY THE COURT:

s/ A.M. Keith
Chief Justice